(3)

No. 91-265

In The

Supreme Court of the United States

October Term, 1991

POTOMAC EDISON COMPANY,

Petitioner,

v.

JOE D. HELMICK, TAMMY HELMICK, CARL BELT, INC., and HESTER INDUSTRIES, INC.,

Respondents.

Petition For A Writ Of Certiorari To The Supreme Court Of Appeals Of West Virginia

BRIEF OF RESPONDENTS JOE D. HELMICK AND TAMMY HELMICK IN OPPOSITION

* FRANK E. SIMMERMAN, JR.
ALLEN, JOHNSON & SIMMERMAN
P.O. Box 150
Clarksburg, West Virginia 26302
(304) 624-6555

* *Counsel of Record for Respondents Joe D. Helmick and Tammy Helmick*

Of Counsel:
DONALD H. COOKMAN
COOKMAN & MORELAND
92 East Main Street
Romney, West Virginia 26757
(304) 822-3566

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether the combination of: (1) West Virginia's system of comparative negligence; (2) West Virginia's Rules on Joint and Several Liabilities; and (3) West Virginia's Statutory Workers' Compensation Immunity violate Federal due process and equal protection principles?

For the benefit of this Court, it should be noted that: as conceded by Potomac Edison Company, the question presented in this Petition is essentially identical to the first question presented in Monongahela Power v. Miller, Cert. Pending, No. 91-146 (filed July 22, 1991). (See Petition page 7, footnote 4.) Moreover, it should be noted that both Monongahela Power Company and Potomac Edison Power Company are wholly owned subsidiaries of Allegheny Power System, Inc. (See pages numbered ii of both Petitions 91-146 and 91-265.)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

No. 91-265

In The

Supreme Court of the United States

October Term, 1991

POTOMAC EDISON COMPANY,

Petitioner,

v.

JOE D. HELMICK, TAMMY HELMICK, CARL BELT, INC., and HESTER INDUSTRIES, INC.,

Respondents.

Petition For A Writ Of Certiorari To The Supreme Court Of Appeals Of West Virginia

BRIEF OF RESPONDENTS JOE D. HELMICK AND TAMMY HELMICK IN OPPOSITION

PRELIMINARY STATEMENT

Through its Petition, Potomac Edison Company requests this Court exercise its discretion to review whether the combination of (1) West Virginia's system of comparative negligence; (2) West Virginia's Rules on Joint and Several Liability; and (3) West Virginia's Statutory Workers' Compensation Immunity violate due process and equal protection principles when a unanimous West Virginia Supreme Court of appeals has concluded that

this tort system does not violate the United States Constitution.

Moreover, while contending that the West Virginia Tort system is wholly arbitrary and irrational, Potomac Edison concedes that "other State and Federal Courts have rejected constitutional arguments akin to those presented by this (its) Petition." Potomac Edison Petition at 16. Potomac Edison also requests that this Court fashion a remedy when Potomac Edison has been unable to precisely describe the relief to which it claims to be entitled, and the West Virginia Supreme Court of appeals has held that "judicial intrusion into the statutory framework, particularly on so complex an issue, is unwarranted," and best left to the legislature. *National Fruit Product v. The Baltimore & Ohio R.R. Co.*, 329 S.E.2d 125 at (West Virginia, 1985). Potomac Edison's assertions notwithstanding, the issues presented by the Petition do not involve a substantial Federal question, do not present any issue appropriate for review, and Respondents Joe D. Helmick and Tammy Helmick pray that this Petition for Writ of Certiorari be denied.

OPINIONS AND ORDERS BELOW

Respondents Joe D. Helmick and Tammy Helmick accept Petitioner's statement of the applicable opinions and orders below.

JURISDICTION

The Petitioner claims that jurisdiction lies under 28 U.S.C. §1257; however, Petitioner has failed to identify any of the grounds for which Certiorari should be granted, as set forth in Rule 10 of the Rules of this Court.

STATEMENT OF THE CASE

On October 24, 1986, Respondent Joe D. Helmick was employed as a laborer by Respondent Carl Belt, Inc. On that date, Carl Belt, Inc. was performing construction work for Respondent Hester Industries, Inc. On October 24, 1986, while Respondent Helmick was assisting in the movement of a guy wire which supported a 19.9 kilovolt phase to ground terminal pole, the guy wire was electrified and Mr. Helmick suffered severe burns to his left forearm and the soles of his feet, ultimately resulting in the amputation of his left arm at the elbow.

In 1987, Mr. Helmick filed a claim for Workers' Compensation benefits against his employer, Respondent Carl Belt, Inc., and was ultimately awarded $53,760.00.

In October, 1988, Respondents Joe D. and Tammy Helmick filed the instant action against: 1) Petitioner Potomac Edison Company, alleging negligent design and construction of the terminal pole and associated guy wire; 2) Respondent Carl Belt, Inc., seeking recovery beyond Workers' compensation benefits for deliberate and intentional exposure to a known hazard; and 3) against Respondent Hester Industries, Inc. predicated upon Potomac Edison Company's prior assertion that

Hester Industries, Inc. owned the subject terminal pole and guy wire and was thus responsible for design and/or construction defects.

As conceded by Potomac Edison Company, West Virginia's Workers' Compensation laws do allow both employees and Third party tort-feasors to pursue employers directly, or for contribution, in limited circumstances. Specifically, if the employee and/or third party can meet the burden of proof imposed by *Mandolidis v. Elkins Industries, Inc.*, ___ W. Va. ___, 246 S.E.2d 907 (1978), and its progeny.

Prior to trial, the Helmicks dismissed their *Mandolidis* claim against Respondent Carl Belt; however, Petitioner Potomac Edison continued to assert its cross-claim for contribution and indemnification against Carl Belt, Inc., predicated upon, among others, *Mandolidis* grounds.

According to the pleadings, the order of proof was Plaintiffs Joe D. Helmick and Tammy Helmick, followed by Potomac Edison Company, to be followed by Carl Belt, Inc. and Hester Industries, Inc.

At the conclusion of Potomac Edison's case, Carl Belt, Inc., through counsel, moved for the entry of a directed verdict predicated upon Potomac Edison Company's failure to meet the burdens of proof established under *Mandolidis*. In response to the Motion for Directed Verdict, Potomac Edison Company, through its counsel, strenuously argued that it had met the requisite *Mandolidis* burden. Potomac Edison failed to assert at trial that dismissal of its claims for contribution against Carl Belt, Inc. would result in the deprivation of any constitutionally protected right. (The issue raised in the Petition). The

trial court concluded that Potomac Edison had failed to meet its burden of proof and Respondent Carl Belt, Inc. was granted a directed verdict as to all claims theretofore asserted by Potomac Edison.

Consistent with the general rules of comparative negligence, and the holdings of *Bowman v. Barnes*, 168 W. Va. 11, 282 S.E.2d 613 (1981), juries in West Virginia are required to assess fault among all parties proximately contributing to causation. Accordingly, the jury was given a special verdict form which directed it to determine the negligence, if any, of the parties to the accident, Joe D. Helmick, Potomac Edison, Inc., and Carl Belt, Inc. The jury concluded that Joe D. Helmick had not been negligent; however, both Potomac Edison Company and Carl Belt, Inc. were guilty of negligence which proximately caused the accident. The jury then assigned unto Potomac Edison Company, 40% of the negligence which had proximately caused the accident and assigned unto Carl Belt, Inc., 60% of all negligence. Notably, Carl Belt, Inc. had offered no evidence, had not been present nor represented at argument, and the assignment to Carl Belt, Inc. was an assignment to an "empty chair" defendant. The jury further found that Hester Industries, Inc., did not breach Paragraph Fifteenth of its contract with Potomac Edison, Inc. and consistent with West Virginia law under the Principles of Joint and Several Liability, the entire verdict was assessed against Petitioner Potomac Edison, Inc., which including pre-judgment interest, totalled $515,621.86.

Thereafter, through a series of post-trial motions, Potomac Edison Company first asserted its claim that dismissal of its claim for contribution against Carl Belt, Inc.

constituted a deprivation of Federal constitutional protections. Each and every post-trial motion filed on behalf of Potomac Edison Company was denied by the Circuit Court of Hampshire County.

On September 18, 1990, the West Virginia Supreme Court of Appeals granted Potomac Edison's Petition for Appeal, and the instant claims of deprivation of constitutional protections were among the nine various errors assigned by Potomac Edison. Potomac Edison Company invited the West Virginia Supreme Court of Appeals to rewrite the laws of contribution and indemnity, arguing that deprivation of Potomac Edison's right to seek contribution from Carl Belt, Inc. violated the Fourteenth Amendment to the United States Constitution, as well as the West Virginia Constitution. In an opinion dated June 27, 1991, the West Virginia Supreme Court of Appeals *unanimously* rejected this argument, relying upon its recent ruling in *Miller v. Monongahela Power Company*, ___ W. Va. ___, 403 S.E.2d 406 (1991), Cert. Pending, No. 91-146 (July 22, 1991).

In *Miller*, the West Virginia Supreme Court held that the combination of: (1) West Virginia's System of Comparative Negligence; (2) West Virginia's Rules on Joint and Several Liability; and (3) West Virginia's Statutory Workers' Compensation Immunity does not violate Federal due process and equal protection principles.

REASONS FOR DENYING THE WRIT

The Petition for Writ of Certiorari does not even allege that this case satisfies the criteria specified in Rule

10 for review by this Court. There is no allegation that the West Virginia Supreme Court of Appeals' decision in *Miller* or *Helmick* is in conflict with any other decision construing West Virginia's System of Comparative Negligence, coupled with West Virginia's Rules on Joint and Several Liability and West Virginia's Statutory Workers' Compensation Immunity.

As conceded in the instant Petition at page 16, "Other State and Federal courts have rejected constitutional arguments akin those presented by this Petition."

The Petition does not identify any important question of law which has not been, but which should be settled by this Court. Instead, the Petition reveals that Potomac Edison Company is simply dissatisfied with the imposition of liability imposed under established State law tort principles by the Circuit Court of Hampshire County and a unanimous West Virginia Supreme Court of Appeals. The decisions of these courts were correct and need not be reviewed by this Court.

I. The Petition Should Be Denied Because West Virginia's System Of Comparative Negligence, Combined With West Virginia's Rules On Joint And Several Liability, And West Virginia's Statutory Workers' Compensation Immunity Constitute A System Of State Law Tort Principles Which Are Not Wholly Arbitrary Or Irrational And Which Do Not Violate Fourteenth Amendment Principles.

This Court has stated "that the State's interest in fashioning its own rules of tort law is paramount to any discernible Federal interest, except perhaps to an interest

in protecting the individual citizen from State action that is wholly arbitrary or irrational." *Martinez v. California*, 444 U.S. 277, 282 (1980).

Only one of the cases which Petitioner cites as supporting its position, *Carlson v. Smogard*, 215 N.W.2d 615 (1974), purports to be controlled by constitutional principles, although the Court there relied on both State and Federal constitutional provisions in a most conclusory manner. The other cases cited by the Potomac Edison Company turn on statutory interpretations, *Couch v. Thomas*, 26 Ohio App. 3d 55, 497 N.E.2d 1372 (1985), *Kentucky Utilities Co. v. Jackson County Rural Elec. Coop. Corp.*, 438 S.W.2d 788 (Ky. 1969), or contractual and state constitutional provisions, *L.M. Duncan & Sons v. City of Clearwater*, 478 So.2d 816 (Fla. 1985) and *Sunspan Engineering & Construction Co. v. Spring-Lock Scaffolding Co.*, 310 So.2d 4 (Fla. 1975).

Contrary to Potomac Edison Company's assertions, West Virginia's tort and Workers' Compensation systems of Joint and several liability and employer immunity is not unique to West Virginia. Similar tort principles exist throughout America without violating constitutional standards. *Hudson v. Union Carbide Corp.*, 620 F. Supp. 558 (N.D. Ga. 1985); *Raisler v. Burlington Northern R.R. Co.*, 219 Mont. 254, 717 P.2d 535 (1985); *Tsarnas v. Jones & Laughlin Steel Corp.*, 418 Pa. 513, 412 A.2d 1094 (1980); *Mulder v. Acme-Cleveland Corp.*, 95 Wis. 2d 173, 290 N.W.2d 276 (1980).

This Court has previously considered virtually the same issues as those presented in this action in *Atlantic Coast Line R.R. Co. v. Erie Lackawanna R.R. Co.*, 406 U.S.

340 (1972) (per curiam), and *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282 (1952), where this Court refused to allow third-party tort-feasors to obtain contribution from employers who were covered by the limitation of liability provisions of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. §§ 901-950). In *Lockheed Aircraft Corporation v. United States*, 460 U.S. 190 (1983) and in *Weyerhaeuser S.S. Co. v. United States*, 372 U.S. 597 (1963), cited by the Petitioner, the issue of third-party indemnity was resolved solely on the basis of statutory interpretation to permit the indemnity claims by the third party against the employer. The issue of limiting third-party claims against employers was also before this Court in *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666 (1977) in which the plaintiff was injured when the ejection seat of a jet fighter malfunctioned during flight, permanently injuring the pilot. The pilot sued Stencel, the manufacturer of the ejection system, for negligence. Stencel cross-claimed against the United States for indemnity. Stencel claimed it was passively negligent while the government's active negligence caused the injuries. The pilot, like Helmick in this action, had received compensation. This Court dismissed Stencel's third-party claims under the limitation of liability provision of *Feres v. United States*, 340 U.S. 135 (1950), which immunizes the United States from a claim asserted by a member of the military, which is essentially identical to the immunity of the employer (Carl Belt) in the state of West Virginia from a claim asserted by an employee (Helmick).

West Virginia maintains a comprehensive system of Workers' Compensation which includes the balancing of

interests of the employee, employer and third parties. Besides granting recovery to employees against non-negligent employers and denying contribution claims grounded in negligence by third parties against employers, the system also provides protection for third-party tort-feasors by precluding employers from recovering Workers' Compensation benefits paid to employees injured by negligent third parties, all as part of the quid pro quo in the balancing of the competing interests of the employee, employer and third parties. *Lockheed, supra,* at 198. *National Fruit Product Co. v. Baltimore & Ohio R.R. Co.*, ___ W. Va. ___, 329 S.E.2d 125 (1985) and *Crab Orchard Improvement Co. v. Chesapeake & Ohio Ry. Co.*, 115 F.2d 277, 282 (4th Cir.), cert. denied, 312 U.S. 702 (1940). It is imperative to note that both employees and third parties are afforded the identical right to recover from an employer either directly or by contribution, providing the claim is based upon an injury from conduct rising to a standard of deliberate intent. *Sydenstricker,* 288 S.E.2d at 511; W. Va. Code § 23-4-2 (Supp. 1991). Also included within this comprehensive statutory scheme is West Virginia's treatment of the receipt of Workers' Compensation benefits as a collateral source as it relates to third-party tort-feasors. See *Jones v. Laird Foundation, Inc.*, 156 W. Va. 479, 195 S.E.2d 821 (1973). Petitioner's argument is merely a veiled attempt to avoid the collateral source rule as established and applied in West Virginia.

Finally, this Court is directed to page 132 of *National Fruit Product Co. v. Baltimore & Ohio R.R. Co., supra,* where the West Virginia Supreme Court of Appeals was urged to recognize the reciprocal cause of action now sought by Petitioner, to-wit: to allow an employer to recover

Workers' Compensation benefits from a negligent third party. In *National Fruit*, the West Virginia Supreme Court declined to allow such recovery, ultimately stating that:

> "We have traditionally stated that our Workers' Compensation System is entirely a statutory creature and for this reason we feel that judicial intrusion into the statutory framework, particularly on so complex an issue, is unwarranted. Subrogation statutes are of necessity extremely complex and detailed because they must be designed to anticipate all of the multifaceted problems that may occur." 329, S.E.2d, at 132

The West Virginia Supreme Court then identified *some* of the issues and problems which would be raised, and identified problem areas affecting Workers' Compensation immunity, joint and several liability, contribution, subrogation, mitigation of damages and standing, among others. See *National Fruit Products Co., supra*, at 132, note 5.

Like the West Virginia Supreme Court of Appeals, this Court should decline to exercise judicial intrusion into such complex statutory framework and the instant Petition should be denied.

II. The Petition Should Be Denied Because The Transparency Of Potomac Edison's Argument That West Virginia's Tort System Is Wholly Arbitrary Or Irrational Is Best Illustrated By The Facts That Hester Industries, Inc., Through Its Counsel, Has, *In These Proceedings*, Made Equally Compelling Arguments That The West Virginia Tort Principles Under Consideration Are Both Constitutional And Unconstitutional.

On or about September 5, 1991, Hester Industries, Inc., through its Counsel, filed its Response Brief In

Support Of Petition For a Writ of Certiorari, arguing that "The system of tort liability to compensate injured workers in West Virginia is violative of the Fourteenth Amendment principles of equal protection and due process as applied to third parties." In its brief, Hester fails to disclose that on or about July 17, 1990, in Defendant Hester Industries' Response to Defendant Potomac Edison's Petition for Appeal, Hester Industries, Inc. contended that "Denial of contribution to Potomac Edison does not constitute a denial of its constitutional rights."[1]

Although Counsel for Hester Industries, Inc. appears to have forgotten the position it previously urged upon the West Virginia Supreme Court of appeals, this Court is directed to pages 9-14 of the Appendix hereto wherein Hester Industries, Inc. makes a compelling argument for the constitutionality of the West Virginia tort system, *then distinguishing many of the cases it now relies upon*. Although it may be subject to argument, it is submitted that if the West Virginia tort system were *wholly irrational* or *arbitrary*, counsel could not advance such inconsistent arguments in good faith.

---

[1] See page 5, heading "Issues", subparagraph numbered 2. of Defendant Hester Industries' Response to Defendant Potomac Edison's Petition for Appeal, reprinted in full text in the Appendix hereto.

CONCLUSION

For the foregoing reasons, Respondents Joe D. Helmick and Tammy Helmick respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

* Frank E. Simmerman, Jr.
Allen, Johnson & Simmerman
P.O. Box 150
Clarksburg, West Virginia 26302
(304) 624-6555

* *Counsel of Record for Respondents Joe D. Helmick and Tammy Helmick*

Of Counsel:
Donald H. Cookman
Cookman & Moreland
92 East Main Street
Romney, West Virginia 26757

APPENDIX

IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA
AT CHARLESTON

JOE D. HELMICK and
TAMMY HELMICK,

Plaintiffs,

vs.

POTOMAC EDISON COMPANY,
a Maryland corporation,
HESTER INDUSTRIES, INC.,
a West Virginia corporation,
and CARL BELT, INC., a
Maryland corporation,

Defendants.

(Circuit Court of
Hardy County
County
No. 88-C-118)
NO. _____

DEFENDANT HESTER INDUSTRIES RESPONSE TO DEFENDANT POTOMAC EDISON'S PETITION FOR APPEAL

WALLACE, ROSS AND GIBSON

By: /s/ Joseph A. Wallace
Joseph A. Wallace

/s/ Geraldine S. Roberts
Geraldine S. Roberts
P. O. Box 1669
Elkins, W. V. 26241

Counsel for Defendant,
Hester Industries, Inc.

I. NATURE OF PROCEEDINGS AND RULINGS BELOW

1. The defendant, Hester Industries (hereinafter Hester) opposes defendant Potomac Edison's petition for reversal of the final order of the Circuit Court of Hardy County in this action.

2. This action was originally filed by the Plaintiffs solely against Potomac Edison. In their answers to interrogatories, Potomac Edison alleged that Hester owned the utility pole in question, which resulted in the Plaintiffs amending their complaint to add Hester as a defendant, in Hardy County Circuit Court, not Federal Court, as stated by Potomac Edison in its request for appeal.

3. Prior to trial, the Plaintiffs dismissed their claim against Carl Belt, Inc. At trial, the judge dismissed Potomac Edison's cross-claim against Carl Belt, Inc. at the close of testimony. All claims against Hester were dismissed except for the contract indemnification issue. *See* Trial Transcript pp. 548 and 575.

4. On the issue of whether Hester Industries was liable under the indemnification clause of its contract with Potomac Edison, the jury found that Hester Industries was not liable. In its verdict form the jury found that Carl Belt was 60% (sixty percent) negligent, and Potomac Edison was 40% (forty-percent) negligent.

5. Because there was insufficient evidence to hold Carl Belt liable for *Mandolidis*-type negligence, the court denied Potomac Edison's request for contribution against Carl Belt.

6. Approximately nine months after trial, Potomac Edison sent out an investigator to interview members of the jury. Based on the information uncovered at that time, Potomac Edison requested that the judge reimpanel the jury. This motion was denied.

II. STATEMENT OF FACTS

The accident from which this action arose occurred on October 24, 1986, when employees of Carl Belt, Inc. were performing work on Hester Industries property. Carl Belt, Inc. was an independant contractor expanding Hester facilities in Moorefield, West Virginia. The work involved digging a ditch near a building. A guy wire to an electrical pole, which had been installed by Potomac Edison, was obstructing the work of Carl Belt. Carl Belt's supervisors had contacted Potomac Edison twice unsucessfully to move the guy wire, and therefore decided to move the guy wire themselves, without the knowledge of Hester Industries. While moving this guy wire, the wire came in contact with charged electrical apparatus at the top of the pole, which resulted in the injury to Joe Helmick.

The pole to which the guy wire was attached had been installed by Potomac Edison prior to October 24, 1986, pursuant to a request by Hester Industries, for electrical service. Location and design of the pole were determined solely by Potomac Edison. The agreement between Hester Industries and Potomac Edison was a standard electrical service agreement produced by Potomac Edison. The agreement included an indemnification

clause, and a clear recitation that Potomac Edison owned all poles and equipment. *See* Exhibit A.

In its Answer, Potomac Edison alleged that Hester Industries owned said pole, which Potomac Edison argues should relieve Potomac Edison of any liability concerning the installation of the pole. At trial, the issue of pole ownership was argued by Potomac Edison without supporting evidence. Potomac Edison also argued that their customer had insulated it from liability by executing the required service agreement which contained paragraph seven, the indemnification clause and paragraph fifteen, the removal or tampering clause. The Circuit Court directed a verdict on the indemnification issue. The other issue under the electrical service agreement was submitted to the jury, which found that Hester was not negligent and paragraph fifteen would therefore not apply.

At jury selection held prior to trial, extensive voir dire was conducted by counsel for all parties in the case, including Potomac Edison. The questions now alleged by Potomac Edison to require a new trial were never asked during voir dire. *See* Transcript of Voir Dire.

Discovery cut-off in this case was July 3, 1989 and the jury was selected on July 10, 1989. Potomac Edison did not reveal its expert witness, despite prior requests for disclosure of witnesses (*see* Exhibit B, Interrogatory to Potomac Edison No. 23), until approximately noon on Sunday, July 16, 1989 with opening statements scheduled for 9:00 A.M. the following day. The Plaintiffs' Motion in Limine to exclude the testimony of Potomac Edison's expert was granted by the Circuit Court.

On July 14, 1989, two (2) days before trial and thirteen (13) days after discovery cut-off, Potomac Edison filed an Amended Complaint raising the indemnification issue for the first time. The trial court permitted the untimely raising of this issue over Hester's objection. Nevertheless, the jury resolved this matter in Hester's favor.

III. ISSUES

1. The circuit court had adequate basis for directing a verdict in favor of Carl Belt as to Potomac Edison's cross-claim for indemnification and contribution.

2. Denial of contribution to Potomac Edison does not constitute a denial of its constitutional rights.

3. The circuit court did not err in refusing to allow contribution by Potomac Edison against Carl Belt.

4. The circuit court did not err in granting Hester's motion for a directed verdict on Potomac Edison's cross-claim for indemnification based upon the contract entered into between Hester and Potomac Edison.

5. The circuit court did not err in not allowing John St. Clair, an expert witness for Potomac Edison, to testify.

6. The circuit court properly allowed Clarence E. Jones, Ph.D., to testify as an expert witness in the trial of this matter

7. The failure of the trial court to reduce the amount of damages awarded the plaintiffs by the jury because the plaintiffs failed to mitigate their damages is not grounds for awarding a new trial.

8. This Defendant takes no position with the trial court's ruling in admitting the photographs of plaintiff's injuries.

9. The trial court did not err in refusing to grant defendant, Potomac Edison a new trial on the basis of alleged concealment of information by jurors.

IV. DISCUSSION

1. The circuit court had adequate basis for directing a verdict in favor of Carl Belt as to Potomac Edison's cross-claim for indemnification and contribution.

Potomac Edison argues that the trial court improperly dismissed its cross-claim against Defendant Carl Belt, and that sufficient facts had been established to show that Carl Belt met the deliberate intent requirement to maintain a common law action against a workers' compensation employer under *Mandolidis v. Elkins Industries, Inc.*, 161 W. Va. 695, 246 S.E. 2d 907 (1978). *Mandolidis* allows an employee to recover against his employer in a common law negligence action if the employee can prove that the employer acted in a "willful, wanton, or reckless" manner. In *Cline v. Joy Mfg. Co.*, 310 S.E. 2d 835 (W. Va. 1983), the court further developed the test for deliberate intent, requiring that the employer have had knowledge and appreciation" of the high degree of risk. In 1983, the West Virginia Legislature reacted to the *Mandolidis* cases and passed the *Mandolidis* reform of the Workers' Compensation Act. *W. Va. Code* § 23-4-3 (1983). The amendments raised the level of proof required to find an employer liable for "deliberate intent". Under the

Mandolidis reform, a plaintiff must establish five specific facts in order to prevail. These are (1) an unsafe workplace which presented a high degree of risk and a strong probability of serious injury or death, (2) that the employer had a *subjective* realization of the risk, (3) that the risk was a violation of a specific statute or safety standard, (4) that despite such knowledge, the employer deliberately exposed the employee to such degree of risk, and (5) that the employee suffered serious injury or death as a direct result of the exposure. *W. Va. Code* § 23-4-3(c)(2)(ii). The statute also provides that a trial court may direct a verdict against the plaintiff, if there is insufficient evidence to find that all the facts were proven. *W. Va. Code* § 23-4-3(c)(2)(iii)(B).

The accident in the present action occurred in October, 1986, therefore, the proper standard to determine whether an action may be maintained action the workers' compensation employer is the reform statute, and not merely *Mandolidis* negligence as alleged by Potomac Edison. In the present action, the claim by the Plaintiff against Carl Belt was dropped prior to trial, after the completion of discovery, because of insufficient evidence to prove all the requirements of the statute. At trial, Carl Belt moved for a directed verdict at the close of evidence. A directed verdict in a *Mandolidis* action is allowed under *West Virginia Code* § 23-4-2(c)(2)(iii)(B). Construing this code section in a diversity action, the Federal District Court for the Southern District of West Virginia held in *Handley v. Union Carbide Corp.*, 620 F. Supp. 428 (S.D. W. Va. 1988) that if there is insufficient evidence on any of the five points required under the statute, a directed verdict is proper.

The trial court set out its specific findings concerning the evidence regarding Carl Belt. (*See* trial transcript at pages 462-64.) It is clear from the transcript that the trial judge knew and applied the appropriate standard in viewing the evidence and granting a directed verdict in favor of Carl Belt.

In order for a third-party tortfeasor to obtain contribution against an otherwise-immune workers' compensation employer, the third-party must establish the same facts as a plaintiff in such an action. *Miller v. Gibson*, 355 S.E. 2d 28 (W. Va. 1987). While *Miller* was determined on the Mandolidis-Cline standard, that standard is at least as strict as the one established by the West Virginia Legislature in its reform. As the trial court properly dismissed Carl Belt at the close of evidence, Potomac Edison may not have contribution against Carl Belt, and therefore is liable for the entire amount of the jury verdict.

2. Denial of contribution to Potomac Edison does not constitute a denial of its constitutional rights.

Potomac Edison argues that it is unconstitutional to refuse to allow contribution against Carl Belt. The standard of review proposed by Potomac Edison is strict scrutiny, alleging that the court's action violated a fundamental right or a involved suspect classification. This is clearly wrong. The United States Supreme Court has established specific suspect classifications which subject a statute to strict scrutiny: race, religion, sex, or alienage.[1]

[1] Potomac Edison has cited *McLaughlin v. Florida*, 379 U.S. 184 (1964), as authority for invoking strict scrutiny. This case

(Continued on following page)

16A *Am. Jur. 2d, Constitutional Law* § 750 at 816. While Potomac Edison is a corporate entity and does not fit any of these classifications. Fundamental rights which will invoke strict scrutiny include the right to procreation, the right to marry, and First Amendment rights including freedom of speech, freedom of assembly, freedom of the press, the right to interstate travel, and the right to vote.[2] *16A Am. Jur. 2d, Constitutional Law* § 750 at 819. While legislatures may not confer rights on corporations which are not available to individuals, corporations may be classified as the legislature sees fit, without violating the Fourteenth Amendment. 16A *Am. Jur. 2d, Constitutional Law* § 777. *Sunspan Engineering & Construction Co. v. Spring-lock Scaffolding Co.*, 310 So. 2d 4 (Fla. 1975), cited by Potomac Edison as the basis of its constitutional claim, is factually distinguishable from the present case. The Florida statute which was held to be unconstitutional in *Sunspan* allowed employers to recover from negligent third parties, but did not allow contribution against employers. *Sunspan* has been distinguished by federal district courts construing the Pennsylvania and Colorado Workers' Compensation Acts. *See Albrecht v. Pneuco*

(Continued from previous page)

involved a challenge to a statute which prohibited co-habitation between mixed-race couples and is clearly distinguished from the facts in the present case.

[2] Access to the courts may be a fundamental right, but it does not invoke strict scrutiny in this instance. In the case cited by Potomac Edison, *Bankers Life & Casualty Co. v. Crenshaw*, 468 U.S. 71 (1988), the Supreme Court denied the appeal of an insurance company which was challenging a state statute which allowed for the imposition of punitive damages on equal protection grounds.

Machinery Co., 448 F. Supp. 851 (E.D. Pa., 1978) and *Greer v. Intercole Automation, Inc.*, 553 F. Supp.275 (D. Co. 1982). It is also clearly distinguishable from the West Virginia law which grants only the employee the right to sue a third-party tortfeasors. *Jones v. Laird Foundation*, 156 W. Va. 479, 195 S.E. 2d 821 at 828 (1973). The employer does not have a right to recover its loss from a negligent third-party. *National Fruit Product Co. Inc. v. Baltimore & Ohio Railroad Co.*, 329 S.E. 2d 125 (W. Va. 1985). Additionally, West Virginia does permit the third-party tortfeasor to have contribution against the employer if the negligent third-party can prove Mandolidis negligence against the employer. *Miller v. Gibson*, 355 S.E.2d 28 (W. Va. 1985).

In the present case, the trial court followed the language of the Workers' Compensation statute as interpreted by the West Virginia Supreme Court in denying contribution for Carl Belt. Any third party tortfeasor, individual or corporation is held to the same standard of proof to recover from a covered employer. The Court has noted in *National Fruit Product v. Baltimore & O.R. Co.*, 329 S.E. 2d 125 at 129, n.2 (W. Va. 1985), that while this allows a windfall for the injured employee, any change must be enacted by the Legislature. (*Citing Jones v. Laird Foundation, Inc.*, 156 W. Va. 479, 195 S.E. 2d 821 at 828 (1973) (J. Sprouse, concurring), which further states that "it is not for this Court to compound the inequity by permitting the negligent physician the protection for a government umbrella with the employer footing the bill.") The holding in *Jones v. Appalachian Power Co.*, 145 W. Va. 478, 115 S.E. 2d 129 (1960), is similar. There the Court held that "[t]he amount of compensation received for injury or death from Workmen's Compensation Fund is not a

proper subject for a remittitur in an action by the injured person, . . . , against a third party responsible for his injury. . . . " *Jones*, 115 S.E. 2d 129, Syllabus Point 3.

As there is no basis to invoke strict scrutiny, the statute need only pass the rational basis test. 16A *Am. Jur 2d, Constitutional Law* §752. The purpose of Workers' Compensation is to insure that an injured employee is compensated for his job-related injury. In exchange the subscribing employer is given immunity from suit, except in cases which fall under the *Mandolidis* reform statute. *W. Va. Code* §§23-2-8, and 23-4-2. This immunity was necessary to withstand constitutional challenges when Workers' Compensation was first enacted, and is clearly a rational basis on which to uphold the statutory immunity granted to complying employers. *See New York Central Railroad Co. v. White*, 243 U.S. 188 (1917).

3. The circuit court did not err in refusing to allow contribution by Potomac Edison against Carl Belt.

Because workers' compensation benefits are a legislative exclusive remedy, contribution is available against an employer only if the employee or the third-party tortfeasor can prove the five factors under the *Mandolidis* reform. The West Virginia Supreme Court of Appeals addressed the specific issue of recovery of the entire verdict against one tortfeasor, despite allocation of percentage of negligence and workers' compensation immunity, in *Riggle v. Allied Chemical*, 378 S.E.2d 2d 282 (W. Va. 1989). At trial, the jury returned a verdict for the plaintiffs, and apportioned causation between the two remaining defendants. The trial court had dismissed the

Mandolidis action against the employer, and assessed the entire amount of the judgment against the remaining defendant. *Riggle*, 378 S.E. 2d at 285. The court later assessed the employer in the defendant's cross-claim, but there was a *Mary Carter agreement* and a *contractual indemnity agreement* between the co-defendants. *Id* at 286 and 288.

The assessment in *Riggle* is identical to the present case. The claim against Carl Belt was dismissed by the trial court for insufficient evidence to uphold a Mandolidis action, yet left in because of Potomac Edison's cross-claim. The jury awarded damages to the plaintiffs, and assessed negligence against the parties. In the trial court's final order it noted that the Plaintiffs could recover against Potomac Edison and, because Carl Belt had been dismissed on the Mandolidis action, it was not liable to Potomac Edison for contribution. *See* Trial transcript at 596-97.

Potomac Edison proposes to allow an offset to the third-party tortfeasor for the amount of workers' compensation benefits or the percentage of negligence assessed against the employer, whichever is less. This is clearly against precedent and the purpose of workers' compensation. *See Jones v. Appalachian Power Co.*, 145 W. Va. 478, 115 S.E. 2d 129 (1960). The Workers' Compensation statute is a trade-off. The employee gives up any right of action against his employer in exchange for a statutory right to be compensated for on the job injuries, absent *Mandolidis* negligence on the part of the employer. *W. Va. Code* §§23-2-6, and 23-4-2.

Workers' compensation is not a complete recovery. The Act completely covers medical expenses, but only compensates the employee partially for his lost wages. There is no recovery for pain and suffering, mental anguish, or loss of consortium. *Jones v. Laird Foundation*, 195 S.E. 2d, 821 at 827-28. The Court has held that a negligent tortfeasor may not have a set-off in the amount of a workers' compensation recovery, as this would serve to excuse the third-party. *Id.* at 828. Potomac Edison would like to apportion the set-off between the Plaintiff and his wife. While Tammy Helmick's claim for loss of consortium is derivative of her husband's action, she has had no recovery from Workers' Compensation. Potomac Edison claims that the dissent in *Mooney v. Eastern Associated Coal* supports this type of set-off, *Mooney* should be distinguished from the present case in that *Mooney* concerned a claim by a widow of an employee, who was entitled to death benefits under workers' compensation. *Mooney v. Eastern Associated Coal Corp.*, 326 S.E. 2d 427 (W. Va. 1984).

The Court has held as recently as 1985 that any contribution between employers and third-party tortfeasors must be legislatively enacted. *National Fruit Product Co. Inc. v. Baltimore & Ohio Railroad*, 329 S.E. 2d 125 (W. Va. 1985). In view of the protection which the Workers' Compensation Act offers both employees and non-negligent employers, the Court should not change its position now.

4. The circuit court did not err in granting Hester's motion for a directed verdict on Potomac Edison's cross-claim for indemnification based upon the contract entered into between Hester and Potomac Edison.

Potomac Edison contends that it was inappropriate for the court to grant Hester's motion for a directed verdict on Potomac Edison's cross-claim for indemnification. The basis of said cross-claim is the Electric Service Agreement dated December 1, 1982, between Hester and Potomac Edison. (*See* Exhibit A).

Following the close of Potomac Edison's evidence, the circuit court directed a verdict in favor of Hester with regard to paragraph seven of the Electric Service Agreement. Paragraph seven provides in pertinent part as follows:

> . . . the Customer [Hester] agrees to at all times indemnify and save harmless the Company [Potomac Edison] from and against all claims, demands, suits, actions and judgments and from and against all costs, expenses, pecuniary or other loss that may arise out of any damage, injury or loss of or to person, life and (or) property caused by any act or omission of the Customer, its agents, servants and employees, . . .

It is well settled that where, from the evidence, only one inference may be reasonably drawn, it is the imperative duty of the court as a matter of law to direct a verdict. Where a motion for a directed verdict is made by a party at the trial of a case, all reasonable doubts and inferences should be resolved in favor of the party against whom the verdict is asked to be directed and the

court must assume as true those facts which the jury may properly find from the evidence. *Prager v. Meckling*, 310 S.E.2d 852 (W. Va. 1983); *Cook v. Heck's Inc.*, 342 S.E.2d 453 (W. Va. 1986); *McGuire Oil Co. v. Ellis*, 377 S.E.2d 460 (W. Va. 1988).

Before the indemnification clause of the Electric Service Agreement would be enforceable, there must be a showing of negligence on the part of Hester. It is only then that Hester would have the duty to indemnify Potomac Edison.

The rule is that when the evidence does not prima facie entitle a party to recover, the motion to direct a verdict for the moving party should be sustained. *Hinkle v. Martin*, 163 W.Va. 482, 256 S.E.2d 786 (1979). It is clear that Potomac Edison failed to establish a prima facie right to recover under the indemnification clause of the Electric Service Agreement. Where a party is not entitled to recover under any view of the evidence as is here with Potomac Edison, a verdict should be directed for the adverse party, Hester. *Mountaineer Contractors v. Mountain State Mack, Inc.*, 160 W. Va. 292, 268 S.E.2d 886 (1980); *Delp v. Itmann Coal Company*, 342 S.E.2d 219 (W. Va. 1986).

5. The circuit court did not err in refusing to allow John St. Clair, an expert witness for Potomac Edison, to testify.

On May 22, 1989, the circuit court entered an Order directing that all discovery shall be completed on or before July 3, 1989. On March 15, 1989, Potomac Edison filed its Answers to Hester's First Set of Interrogatories wherein the response was that Potomac Edison had not

retained any experts. (See Exhibit B). On July 10, 1989, following the conclusion of discovery, Potomac Edison filed a Supplemental Answer to Hester's Interrogatory No. 23, wherein E. William Johnson, an economist and Stephen M. Townsend, a psychologist, were disclosed as expert witnesses. (See Exhibit C). Even at this time, Potomac Edison still failed to disclose John St. Clair as an expert witness. On Sunday, July 16, 1989, at approximately noon, the day before the trial was to begin, Potomac Edison disclosed John St. Clair as an expert witness via a fax message. During the course of the presentation of Potomac Edison's evidence, counsel called John St. Clair as a witness. The circuit court would not permit his testimony because of the late disclosure. (See Trial Transcript 425-426).

Under Rule 26(b)(4)(A)(i), West Virginia Rules of Civil Procedure, a party is required to disclose to another party the identity of persons whom that party intends to call as expert witnesses at trial only when that party has determined *within a reasonable time before trial* who his expert witnesses will be. *Michael v. Henry*, 354 S.E.2d 590 (1987), (emphasis added). There is no argument that would support the position that counsel for Potomac Edison's disclosure of John St. Clair as an expert witness was made within a reasonable time before trial. Furthermore, it is ludicrous for counsel for Potomac Edison to contend that this expert witness was made available for deposition when his identity was made known less than twenty-four hours before the commencement of trial.

Rule 26(e)(1)(B), West Virginia Rules of Civil Procedure, provides in pertinent part:

> (e) *Supplementation of responses.* A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows:
>
> (1) A party is under a duty reasonably to supplement his response with respect to any question directly addressed to:
>
> * * *
>
> (B) The identify of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony.

This Rule provides for sanctions for failure to comply with a discovery request, regarding subsequently obtained information, as part of the court's inherent power to impose sanctions in carrying out its obligation to conduct a fair and orderly trial. *Prager v. Meckling*, 310 S.E.2d 852 (W. Va. 1983).

The circuit court, in its inherent power, would not allow the testimony of John St. Clair inasmuch as Potomac Edison had failed to supplement its responses to discovery requests in a timely manner and disclose this witness. Unlike the facts in *Hulmes v. Catterson*, 388 S.E.2d 318 (W. Va. 1989), where a pretrial conference and a trial date had not been set, a jury had been selected and the trial in this matter was to begin the next day.

Additionally, Potomac Edison had failed to obey the circuit court's order setting a discovery deadline of July 3, 1989. Rule 37(b), West Virginia Rules of Civil Procedure, provides that if a party fails to obey an order with regard

to discovery, the circuit court may impose sanctions. In this case, the circuit court refused to allow Potomac Edison to introduce evidence through the testimony of its expert witness, John St. Clair. The imposition of sanctions by a circuit court under Rule 37(b), West Virginia Rules of Civil Procedure, is within the sound discretion of the court and will not be disturbed upon appeal unless there has been an abuse of that discretion. *Bell v. Inland Mutual Insurance Co.*, 332 S.E.2d 127 (W. Va.), *cert denied* 474 U.S. 936 (1985). Potomac Edison has failed to show an abuse of discretion by the circuit court.

The circuit court's action in disallowing the testimony of John St. Clair on behalf of Potomac Edison was appropriate and should not be disturbed.

6. The circuit court properly allowed Clarence E. Jones, Ph.D., to testify as an expert witness in the trial of this matter.

Potomac Edison contends that the Plaintiff's expert, Clarence E. Jones, should not have been permitted to testify as an expert witness.

Rule 702, West Virginia Rules of Evidence, allows the use of expert witnesses to " . . . assist the trier of fact to understand the evidence or to determine a fact in issue, . . . " The test in West Virginia to determine whether a witness qualifies as an expert is whether the witness is shown through training, education, or practical experience to possess significant skill and knowledge regarding the technical subject. Cleckley, *Handbook on Evidence* § 71(B).

Before an expert opinion is admissible, a foundation must be laid wherein the expert's qualifications must be demonstrated to the court. As to the question of a witness's qualification as an expert, it lies largely in the discretion of the trial court, whose judgment is not to be reversed, unless it clearly appears that the witness is not qualified. *Moore, et al. v. Shannondale, Inc.*, 152 W. Va. 549, 165 S.E.2d 113 (1968). The trial court has broad discretion in the matter of admission or exclusion of expert testimony and the ruling will be sustained unless it is manifestly erroneous. *Salem v. United States Mine Co.*, 370 U.S. 31 (1962). This court in *State v. Johnson*, 111 W.Va. 653, 164 S.E. 31 (1932), stated that the question of qualification of a witness as an expert rests largely in the discretion of the trial court, there being no arbitrary and fixed test of such qualification. It is a question for the jury as to the weight of the expert's testimony. It is clear that the determination of whether a witness has sufficient knowledge of the matter in question, so as to be qualified to give his opinion, is largely within the discretion of the trial court and will not ordinarily be disturbed on appeal unless clearly and prejudicially erroneous. *State v. M.M.*, 163 W.Va. 235, 256 S.E.2d 549 (1979); *Mollohan v. Black Rock Contracting, Inc.*, 235 S.E.2d 813 (W. Va. 1977).

The proper foundation for the admission of the expert testimony of Clarence E. Jones was properly laid by counsel for the Plaintiffs. (*See*, Trial Transcript 88-91). The circuit court granted counsel's motion to qualify Dr. Jones as an expert. (*See*, Trial Transcript 92). Although counsel for Potomac Edison objected to the qualification of this witness as an expert, the circuit court's ruling should not " . . . be disturbed on appeal unless clearly

and prejudicially erroneous." *Cox v. Galigher Motor Sales Co.*, 213 S.E.2d 475 (W. Va. 1975). Potomac Edison has failed to show that the trial court's decision with regard to the testimony of Dr. Jones as an expert witness and the subsequent admission thereof was in any way clearly and prejudicially erroneous.

7. The failure of the trial court to reduce the amount of damages awarded the plaintiffs by the jury because the plaintiffs failed to mitigate their damages is not grounds for awarding a new trial.

Defendant, Potomac Edison, alleges that the trial court erred in refusing to reduce the amount of damages awarded by the jury because Joe Helmick failed to mitigate his damages by not returning to work after the job at Hester Industries was completed.

In the instant case, Joe Helmick returned to work for Carl Belt after the accident, performing light duty chores, and ceased working when the job at Hester Industries was completed. He did seek other employment, but at the time of trial had not been able to secure employment. In *Gault v. Monongahela Power Co.*, 223 S.E.2d 421 (W. Va. 1976), Gault testified that, prior to the accident he had retired on a trial basis, but intended to return to work because his retirement earnings were not adequate to support he and his wife. Monongahela Power Company cited error in the trial court for allowing testimony of this nature, stating that such testimony was speculative. This Court held that a Plaintiff has a right to be compensated for impairment of his physical capacity and impairment of his ability to earn, regardless of whether or not he

intends to work. In this case, Joe Helmick's earning capacity has been impaired, and whether or not he can, or intends to return to work, is not the basis for reducing the amount of the jury's verdict or setting aside the verdict and awarding a new trial.

The jury, in reaching its verdict, heard the evidence and weighed the testimony of all witnesses, including expert witnesses regarding the economic loss Joe Helmick had suffered as a result of this accident. In West Virginia, an Appellate Court must not set aside a jury verdict upon the claims that it is excessive, "unless the verdict is monstrous and enormous, at first blush beyond all measure, unreasonable and outrageous, and such as manifestly shows jury passion, partiality, prejudice, or corruption", quoting *Addair v. Majestic Petroleum Co.*, W.Va 105, 232 S.E.2d 821 (1977). See also *Roberts v. Stevens Clinic Hosp., Inc.*, 345 S.E.2d 791 (W.Va. 1986).

It is clear that the verdict arrived at by the jury was in accordance with the evidence adduced at the trial, and the verdict should stand.

8. This Defendant takes no position with the trial court's ruling in admitting the photographs of plaintiff's injuries.

This Defendant takes no position with regard to any error of the trial court in admitting the photographs taken by Plaintiff's treating physician of Plaintiff's wrist and hand inasmuch as it objected to their admission at the trial of this action on the basis of their inflammatory nature. Defendant, Potomac Edison, argues that the trial court erred in admitting these photographs, citing the

case of *Catlett v. MacQueen*, 375 S.E.2d 184 (W.Va. 1988), where this Court ruled that the Trial Court properly excluded photographs which were not used by a doctor to aid in his testimony.

While Potomac Edison argues that the photographs were improperly admitted into evidence, this Defendant will concede that this Court's position on the admission of photographs as evidence is becoming more liberal. Most recently this Court in *Roberts v. Stephens Clinic Hosp., Inc.*, supra, ruled that the admission of a "day in the life tape" was proper.

Although Dr. Caccucio did rely on these photographs during his testimony at the trial of this matter, Plaintiff testified that he had no pain in the areas depicted by the photographs and this testimony somewhat minimized the inflammatory nature of the photographs upon the jury.

9. The trial court did not err in refusing to grant defendant, Potomac Edison a new trial on the basis of alleged concealment of information by jurors.

Upon conducting a post-trial interview with members of the jury be an investigator, Potomac Edison allegedly discovered information which they believe warrants a new trial. Potomac Edison moved the trial court to grant them a new trial, basing the motion on grounds that two members of the jury were related by marriage and that one member's husband had been killed in an industrial accident. No proof of these facts was offered by Potomac Edison other than the affidavit of a non-juror whose source of information is not known. The trial court denied the Motion for a New Trial.

Case law and underlying policy support the trial court's decision. Attorneys are required to conduct a comprehensive and diligent pre-trial inquiry with regard to jury members. Failure to conduct pre-trial inquiry and to conduct meaningful voir dire does not entitle a party to a new trial. Accordingly, the trial court properly denied Potomac Edison's Motion for a New Trial.

Post-trial examination of the jurors allegedly revealed that two of the jurors were related by marriage and the third had lost her spouse in an industrial accident. Failure of Potomac Edison to conduct a pre-trial investigation of the jurors and failure to conduct meaningful voir dire does not constitute wilful or inadvertent failure to disclose relevant information, and is not grounds to set aside the jury verdict and award a new trial.

It has never been a practice in West Virginia to set aside a jury verdict on the basis of an attorney's failure to conduct meaningful voir dire. In *State v. Scotchel*, 285 S.E.2d 384 (W.Va. 1981), this Court ruled that a Defendant's assertion, after verdict was returned, that the juror had been prejudiced would not be well taken, since Defendant did not exercise due diligence on voir dire. This question has most recently been addressed in *State v. Hardway*, 385 S.E.2d 62 (W.Va. 1989), where this Court ruled that where a Defendant did not exercise reasonable diligence in ascertaining possible disqualification of juror on basis that juror was related to prosecutor's secretary and thus, was not denied fair trial through service of that juror because Defendant failed to ask questions which would determine whether any member of jury panel was closely related to prosecutor or member of his staff.

Potomac Edison inquired of the jury if they were related by blood or marriage to a shareholder of Carl Belt, Incorporated, an employee of Carl Belt, Incorporated, a shareholder of Potomac Edison Company, an employee of Potomac Edison Company, but failed to inquire if any of the jurors were related to each other.

As to the juror who failed to disclose that her husband was killed in an industrial accident, she was not asked to reveal this information on voir dire. Attorney for Potomac Edison conducted the following voir dire in addition to that of the Court:

> Question: Has any member of the panel or his or her relatives, either by blood or marriage, or friends, been involved in any lawsuit, criminal or civil, involving alleged personal injuries? Or has any of you made a claim or had a claim made against you for damages or monies as a result of personal injuries?
>
> Jury: No response.
>
> Question: If any member of the jury panel answers the Question 12 in the affirmative, we'll have to go through that.
>
> Jury: No response.
>
> Question: Has any member of the panel been a victim of or had a relative or friend who has lost a limb or become *permanently or partially disabled* in any manner whatsoever?
>
> Jury: No response.
>
> Voir Dire Transcript, p. 10

It is clear that this juror would have not been required to respond affirmatively to Potomac Edison's

voir dire inquiries because he did not describe her particular set of circumstances. Neither the juror nor husband was involved in a lawsuit claiming of personal injuries, her husband did not lose a limb, was not permanently or partially disabled, but was killed. This Court has held that there was no connection between the alleged fact that some of the jurors had lost relatives by automobile accidents and the qualification of individual jurors who hear the case. *Utt v. Herold*, 127 W.Va. 719, 34 S.E.2d 357 (1945).

If Potomac Edison had engaged in a pre-trial inquiry of the jurors on the jury list rather than a post-trial inquiry, relevant information about these jurors could have been ascertained before the jury was chosen. Biographical information was provided to the parties by the Circuit Court and it is not violative of any West Virginia law for a party to conduct a discreet, pre-trial inquiry. Pre-trial inquiry would have given Potomac Edison an opportunity to prepare and utilize a more meaningful voir dire and if it could not get the jurors struck for cause, it could have used its preemptory strikes to bar these jurors from sitting on the jury.

In *Wagoner v. Iaeger*, 49 WV 61, 38 S.E. 2d 528 (1901), the Supreme Court ruled that a verdict will not be disturbed because of challenge against a juror, grounds for which might have been discovered by exercise of ordinary diligence and that failure to exercise such diligence is equivalent to a waiver of the challenge. In the case of *Garrett v. Patton*, 81 W.Va. 771 (1918), the Supreme Court found that in order that the disqualification of a juror may be made ground for setting aside a verdict, it must be made to appear by the party making the motion that

he did not know of, and could not have discovered by the use of reasonable diligence, such disqualification before the jury was sworn. (Emphasis added.) Failure by Potomac Edison to use reasonable diligence before trial to ascertain facts about the jury and to conduct meaningful voir dire does not warrant a post-trial inquiry to glean information about the jurors for the purposes of securing a new trial.

The post-trial inquiry of the jurors by Potomac Edison was improper. The Court advised the jurors not to discuss the case after they rendered their verdict and were excused.

The Voir Dire Transcript, at p. 24 reads:

> The Court then thanked the jury for their service in the case and excused them from further service in this case. He also informed them at this time that they did not need to talk with anyone about the case, etc.

In *Roberts v. Stephens Clinic Hosp., Inc.*, 345 S.E.2d 791 (W.Va. 1986), this Court ruled that parties may not engage in posttrial, collateral attack upon jury's integrity in absence of showing of corruption or bias. *Haight v. Goin*, 346 S.E.2d 353 (W.Va. 1986) also provides that a juror should not discuss the case with anyone outside the jury room.

Further, Potomac Edison did not secure affidavits from the jurors, but rather tendered the affidavit of a non-juror, believed to be an employee of Potomac Edison's counsel, based upon discussions between the affiant and the individual jurors. Affidavits of Jurors are inadmissible to impeach their own verdict. The affidavit of a non-

juror is hearsay and is not the proper vehicle under which a jury verdict may be set aside. See *Miller v. Blue Ridge Transp. Co.*, 15 S.E.2d 400 (W.Va. 1941); *Utt v. Herold*, 34 S.E.2d 357 (W.Va. 1945).

This information about the jurors was not revealed to the Court and the other parties until some nine (9) months after the verdict was entered, at which time Potomac Edison filed a Motion to Set Aside the Jury Verdict under Rule 60(b) of the West Virginia Rules of Civil Procedure on the basis of newly acquired evidence. Even if it were proper for to engage in a post-trial inquiry of the jurors, the Court did not err in refusing to set aside the jury verdict. Rule 60(b) of the West Virginia Rules of Civil Procedure limits the time for Motions filed on newly acquired evidence strictly to eight (8) months from the date of the judgment order, which was filed on July 26, 1990, a period of more than eight months prior to April 27, 1990. This issue has recently been addressed by the Court in the case of *Savas v. Savas*, 382 S.E.2d 510 (W.Va. 1989), and this Court strictly interpreted Rule 60(b) and ruled that a party seeking relief from final judgment on ground of mistake, surprise, excusable neglect, or unavoidable cause, newly discovered evidence, fraud, misrepresentation or misconduct, or for any other reason justifying relief must seek relief within reasonable time, but in any case not more than eight months after the judgment order was entered.

There was no bias of any juror in the instant case. Potomac Edison failed to conduct a diligent investigation of the jurors before the jury was sworn and did not conduct a meaningful voir dire. As there was no error in

the Trial Court with regard to the jury being chosen, the verdict must stand.

V. PRAYER

WHEREFORE, the Defendant, Hester Industries, opposes Defendant, Potomac Edison's request for Appeal and respectfully requests that this Honorable Court let stand the verdict and judgment of the Circuit Court of Hardy County.

Respectfully submitted,

Defendant Hester Industries
By counsel